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No. 93-822

In The

Supreme Court of the United States

October Term, 1993

BANCO COOPERATIVO DE PUERTO RICO,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

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Respondent claims in its Reply Brief that our "principal complaint is that the FDIC twice 'imped[ed] [petitioner] from executing a valid attachment order'; however, [we] concede that in each instance attachment was 'barred by law.' " Said statement is incorrect due to their quoting out of context from our Petition. In said petition we stated:

> "The fact remains that they impeded Banco from executing a valid attachment order, with the aid of the Court, without any legal basis for their actions, in what could be termed an abuse of legal proceedings." Pet. 7.

How a claim that they impeded us "from executing a valid attachment order . . . without any legal basis

. . . abus[ing] of legal proceedings . . . with the aid of the Court," be equated to an admission that their action is legal, or our action was "barred by law", is beyond our comprehension.[1]

Our contention is, and always has been, to the effect that Banco Cooperativo had a prior judgment to FDIC's, and as early as 1987 attempted to execute an attachment. The FDIC (which did not get his judgment until three years three months after Banco got his) and a Federal District Judge from our Federal District Court, acting under the urging of FDIC, prevented Banco from attaching, threatened us with contempt proceedings, with the Judge **assuring us that Banco's rights would be preserved by the Court**, and that we were not waiving anything by the Court taking possession of the property Banco tried to attach. The property (shares) were to be taken under the custody of the Court – the Judge stated – just "for safekeeping". **SOME SAFEKEEPING!!**

The Court stated, and Banco believed in the truth of the statement; **that Banco's rights would be preserved by the Court**, that we were **not waiving anything** by not making the attachment, that the shares were taken under the custody of the Court just "for safekeeping". Yet, several years later that same Court gave the property to FDIC, the Circuit Court went along, and the only reason given is: **because they attached first.**

FDIC sidesteps the moral and ethical issue with the simplistic pronouncement that "Puerto Rico law

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[1] Our "barred by law" statement refers to the fact that during the bankruptcy proceedings our attachment could not be perfected as it was barred by the Bankruptcy law.

establishes a 'race of diligence' between judgment creditors[2] and encourages each to attach first. **IN THIS CASE, THE FDIC SIMPLY WON THE RACE.**" Apparently, it is FDIC's contention that how you win the race does not matter. Allow us two observations on said assertion.

First, it is not a race as to who attaches first. In any case, it is as to – if both are common creditors – who gets a judgment first. FDIC makes the same mistake of the lower courts of ignoring the difference between "common" and "preferred" creditors, which our statute clearly makes. They also ignore the limitation of the **Oronoz** decision made by our Supreme Court in the case of *Heirs of Garriga v. O'Meara*, (1920), 28 P.R.R. 332, where our Supreme Court explains the *Oronoz* case, excluding any mention of judgments, thus:

> "The case of *Oronoz & Co. v. Alvarez*, 23 P.R.R. 497, is not applicable. There the question was regarding the preference of rights derived from certain attachments levied, while the present case refers to the preference of claims by virtue of certain statutory rights."

We must also mention the case of *Wholesalers Chamber of Commerce* v. *Superior Court, Sucesores de Esmoris & Co.*, 2 P.R. Sup. Ct. Off. Trans., 838, (1974) where the court said [footnote #3] that "it will be the judgment, and not the attachment, what gives preference to the credit. Article 1824 of the Civil Code, infra." In 1974, despite other interpretations Art. 1824 is still alive. And, in the same footnote our Court added:

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[2] What happened to: judgment credits "shall have preference among themselves according to the priority of dates of . . . the judgments". Article 1824 (4) **in fine?**

> "For that reason the statement of motives of the Mortgage Law of 1861 stated that cautionary notices 'do not declare any right or even less turn into real the one which did not have that nature,' as neither 'can it be said that they are the prize of the race,' as it has been said in another nation, assimilating the persistence of creditors to anticipate to obtain the entry, to the anxiety which the arrival in horse races is disputed . . . nor they make the judge agent of the litigants . . . "

Said reasoning, applicable to entries or annotations in our Property Registry, is also applicable to situations like the one confronted in the **Heirs of Garriga** case, where the preference is claimed "based on certain statutory rights". Such is the case when Article 1824 is invoked. In other words, if the situation concerns "common creditors" as defined by our Code, let the creditors run to attach first, but if a creditor has an Article 1822, 1823 or 1824 preference, i.e. not a common creditor, the race is not for him.

The second point we candidly must mention to This Honorable Court has to do with: if there is to be a race, what can you do and not do to win it. Can you order somebody to break the leg of your closest competitor, to win the race and get the prize?[3] Can you get a court to forbid somebody to do something he/she has a right to do, and later claim priority because you did and he did not do what you/the court prevented him from doing?

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[3] The ex-husband of skater Tonya Harding hired somebody to break a leg of Olympian Nancy Kerrigan. Miss Kerrigan could not compete and Tonya "won" the competition. Now all implicated are facing criminal charges and Tonya faces disqualification from the U.S. Olympic team. Justice is being done.

The most pathetic factor in this case is that a Federal District Judge was used – we are sure unwittingly, but very effectively – with the full imprimatur of his high office. If a citizen cannot accept, credit or trust assurances he/she receives from a Federal District Court, maybe our national motto "IN GOD WE TRUST" should be amended to read "WE SHOULD ONLY TRUST GOD".

The second most pathetic factor is that the instigator of the injustice committed in this case is a Federal Government Agency, represented before this High Court by an impressive list of attorneys from none other than the U.S. DEPARTMENT OF JUSTICE.

The bottom line, if FDIC's attachment is allowed preference over the interest of Banco, is that Banco had a right to its attachment in 1987, but got mugged en route to its destination, of all places, in the web of the judicial system in a Federal Courtroom.

CONCLUSION: A writ of Certiorari should be issued and Banco's judgment granted priority, or the case be remanded to our District Court for an evidentiary hearing, should conclusions of facts be deemed necessary.

Respectfully submitted,

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